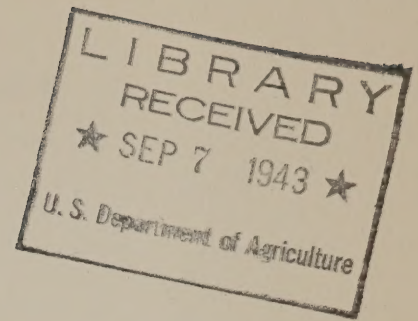


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VERMONT STATE MILK CONTROL ACT

PAPER NO. 10. Series of State Milk Control Acts,
Dairy Section, Agricultural Adjustment Adminis-
tration, United States Department of Agriculture.

June 11, 1937.

INTRODUCTION

This is the tenth of a series of papers designed to make available, in a condensed and convenient form, information concerning State milk control acts, the type of regulation issued thereunder, and, in general, the legal developments in connection with their administration and enforcement.

The series, to date, includes a paper on each of the following State controls: Indiana, Alabama, Connecticut, California, New Jersey, Virginia, New York, Pennsylvania, and Rhode Island. Other papers are in process of preparation, there being at the present time some twenty States having milk control laws.

It is expected that a general summary of all the State acts and regulations will be prepared when the review of individual State acts and regulations is completed. In this connection some comparison may be made. These papers omit much detail which might be helpful to those concerned with legislative or administrative problems of State milk control. Those who desire more complete information will undoubtedly find it to their advantage to get in touch with the officials charged with the administration of these acts.

STATE MILK CONTROL IN VERMONT
THE ACT, ITS ADMINISTRATION AND LEGAL STATUS

PART ONE

I. General Character of Legislation

Permanent milk control legislation has very recently succeeded the emergency milk control act of 1933^{1/}. The present law^{2/} declares that the production and distribution of milk are "affected with a paramount public interest" in that public health "imperatively requires an uninterrupted continuance of an abundant supply of pure milk." Both this necessary supply and the dairy industry itself are imperilled, says the legislative declaration, by certain unfair and destructive trade practices of a nature likely to undermine health regulations and health standards and constituting "a menace to the health, welfare and reasonable comfort of the inhabitants of the state." The general purpose of the law, therefore, is (1) to protect and promote the public welfare "by insuring at all times an adequate supply of clean and pure milk and cream of proper quality to meet the needs of the inhabitants of this state," and (2) "to regulate the milk-marketing industry, and to control in general all milk sold or offered or exposed for sale to the inhabitants of this state, to the end that the public health shall not be menaced or jeopardized."

Type of Governing Agency

Named in the law as members of a "milk control board" are the Commissioner of Agriculture as chairman and the Commissioner of Public Welfare (neither of whom shall receive compensation as members), and a third member to be appointed biennially by the Governor and receiving such compensation as the Governor shall determine. The board is allowed its necessary expenses, and upon approval by the Governor, may employ necessary assistants subject to the provision that all expenditures shall be paid from the receipts taken in pursuant to the provisions of the act.

Conditions Under Which Powers of Board May be Exercised

Power to supervise, regulate and control the distribution and sale of milk^{3/} anywhere within the State is vested in the board,

^{1/} Chapter 197 of the Public Laws of 1933, approved July 19, 1933.

^{2/} Approved March 26, 1937.

^{3/} "Milk", as defined, "means fluid milk, cream, skim milk or butter-milk, fresh, sour or storage, irrespective of whether or not such milk is flavored, except as otherwise specifically provided."

which may, subject to certain limitations noted elsewhere in this outline, act entirely upon its own initiative in the exercise of this power. Absent from the act is the limitation contained in the law of 1933, viz., that the board should not exercise its power in any market except upon written application of a producers' association or of producers, in either case supplying, in the judgment of the board, a substantial proportion of the milk consumed in the market.

Source of Financing

The money received by the board from annual license fees^{4/} and all penalties collected for violation of any provision of the act constitute the sole basis for financing the board and its activities. This money is to be paid promptly into the State Treasury, held there in a separate fund, and paid out only upon the warrant of the Auditor of Accounts for such purposes of the act as may be approved by the chairman of the board. (Under the 1933 act, producers also paid in the form of volume assessments.)

Statutory Protective Provisions

Two "saving" clauses seek to protect the validity and constitutionality of the act: (1) a separability clause declaring that if any provision of the act or its application to any person or circumstances is held invalid, the remainder of the act and the application of such remaining provisions to other persons and circumstances shall remain unaffected; and (2) a clause declaring that nothing in the act shall be construed as applying to interstate or foreign commerce except as may be permitted by the Federal Constitution and laws thereunder enacted.

II. Regulatory Provisions.

Powers of the Board

Investigation.- Ample powers granted the board to investigate all phases of the milk industry, give substance to the provision in the law declaring that "it shall be the duty of the board to be informed at all times" as to the supply, production and quality of milk and the transportation, processing, storage and distribution of milk sold, consumed or used in the State. The board, for example, is empowered to conduct hearings, subpoena and under oath examine producers, distributors and others, together with their books, records, documents, correspondence and accounts. In addition, any member of the board or its representative is granted access to and may enter and examine, at all reasonable hours, all places where milk is produced, handled, distributed or sold, and may examine all books and records kept on such premises.

^{4/} Required from distributors in designated markets and ranging from \$2 to \$10 according to volume of milk sold daily.

Licensing powers.-- Licensing of distributors is confined to the markets^{5/} designated as natural marketing areas by the board. All distributors^{6/} in such a market are required to be licensed by the board and, with the exception of those selling daily not more than five quarts of milk or its equivalent in cream, pay annual license fees. (See footnote 4.) The board may, after giving "reasonable notice" and "opportunity to appear and be heard", decline to grant a license "upon proper evidence" and "for cause", and may likewise--except that such action shall be after "due notice and public hearing"--suspend or revoke a license already granted. The board may also suspend, revoke or "withhold" a license for violation of "the" provisions of the act or of "any" rule or regulation made thereunder, or for conviction of violating the health laws or regulations of the State Board of Health. Furthermore, the board may suspend or revoke^{7/} a license already granted "when satisfied of the existence" of any of six specified conditions or circumstances; for example, that the licensee (1) has committed any act which may demoralize the price structure of milk or interfere with an ample supply of milk for the people of the State; (2) has been or is a party to a combination to fix or maintain prices contrary to any provision of this act; (3) has engaged in a course of action such as to indicate an intent to deceive or defraud customers, buyers or consumers; or (4) has failed either to keep records or to furnish the statements or information required by the board.

Before declining to grant a license and before conditioning, limiting, suspending or revoking one already granted, the board shall permit the applicant or licensee to appear at the hearing in person or by attorney, and evidence pertinent to the subject of the inquiry may be offered, and to that end the licensee or applicant may request the board to exercise its powers with respect to the compulsory attendance of witnesses and the production of books and records.

Bonding of distributors not required by act.-- The law has no provision for the bonding of distributors or licensees.

Records and reports.-- Regardless of whether or not distributors are in a "specified market"^{8/} or are licensed, they are required by the act to keep "such records and make such reports as the board may reasonably require

^{5/} "Market", by definition, "means any city, town or village, or two or more of the same, designated by the board as a natural marketing area."

^{6/} "Distributor", as defined, "means any person who produces and sells, or who purchases for sale or sells, milk daily within the state for consumption, disposition or use within the state, except those who sell milk for consumption on the premises. A producer who delivers or sells milk to a distributor only shall not be deemed a distributor." It appears that the transaction of the distributor, whether buying for sale or selling, shall be a daily one.

^{7/} Declining to grant or "withholding" is not included.

^{8/} That is, a market "specified by the board as one in which it is in the public interest to regulate the supply, production and quality of milk."

to keep it informed at all times as to the adequacy of the supply, production and quality of milk." As regards distributors in "specified" markets there is no limitation as to the nature of the records and reports which the board may require other than that they shall be "reasonably" required.^{9/}

Cooperation with other authorities.— The board is empowered to confer and agree with milk control boards or other legally constituted authorities of other States, or with agencies of the Federal Government, and to adopt "necessary regulations to effect a uniformity in regulation and assure an adequate and proper milk supply in Vermont."

Mediation and arbitration not specified.— The words, "mediation" and "arbitration", are absent from this act. It is mandatory, however, that the board "procure the cooperation of those engaged in the industry to maintain fair and lawful trade practices".

Powers in Regard to Price Regulation

Prices to be paid producers and to be charged by distributors.— The condition under which the board is empowered to fix prices of milk and otherwise regulate the selling of milk is as follows: The board must first determine, either upon complaint or upon its own initiative, after public notice and hearing, "that the public health is menaced, jeopardized or likely to be impaired or deteriorated by the loss or substantial lessening of the supply of milk of proper quality in a specified market" (defined in footnote 8),

Having determined that in a specified market the situation is such as to meet the legislative requirement stated above, the board, "as long as such condition is found to prevail in such market," shall fix prices to be paid for milk and to be charged for milk by distributors--a mandatory, not discretionary, duty. Prices so fixed shall be "just reasonable minimum or maximum prices, or both," and consist of (1) prices paid to producers or associations of producers by distributors and (2) prices charged consumers and others by distributors.

In fixing such prices, the board must "investigate and ascertain what are reasonable costs and charges for production, hauling, handling, processing and any other services performed in respect of milk, and determine what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and will best promote the public interest. The board shall take into

^{9/} The act contains no provision enjoining the publication of information secured by the board through books, records, or otherwise.

consideration the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public, and the amount necessary to yield a reasonable return to the producer and to the milk dealer. Prices so fixed need not be uniform in all markets and may be changed from time to time after notice and public hearing as deemed by the board in the public interest."

Method of payment to producers.- Under the same conditions and limitations that govern and make mandatory the fixing of prices, the board shall prescribe "the manner of payment" to producers or their associations. The act contains no reference to a base-rating plan or to a market-wide plan for pooling milk under authority of the board. Neither of these procedures was the board empowered to undertake under the act of 1933; nor did it do so. The law authorizes the board to establish classes and grades of milk (or accept those already established and defined), and to specify to what classes or grades the prices shall apply. In cases where the board specifies "class-use" prices, the method or "manner" of payment indicated will probably be that of the individual-distributor pool.^{10/}

Unfair Competition and Trade Practices

The board is not specifically empowered to promulgate rules, regulations or codes concerning fair or unfair trade practices or methods of competition. The words, "competition" or "unfair competition", do not appear in the law. As to trade practices, the board "shall procure the cooperation" of those engaged in the milk industry "to maintain fair and lawful trade practices". It may be assumed that the board may exercise some control over some trade practices through its licensing power. For example, the board may suspend or revoke a license when satisfied that the licensee "has committed any act which may demoralize the price structure of milk". Under this wording the board appears to have authority to determine whether or not practices are demoralizing to the price structure; for example, any practice or device, through rebate, advertising allowance, combination sale, etc., the effect of which would be to lower prices fixed by the board.

Limitations and Exceptions

Several provisions in the act place limitations upon the power of the board. One of these is that authority conferred by the act is to supplement, but not to be in lieu of, existing laws relating to (1) transportation, inspection, and testing of milk, and (2) powers of the State Board of Health and local health ordinances and regulations. Excluded from the price-fixing provisions of the act are transactions in milk with authorized officials of any town or city charity or public welfare department or with approved charitable organizations. Excepted from the status of a distributor is a

^{10/} For permissive pooling of milk by a cooperative, see "Status of Cooperative Associations."

person who sells milk (only) for consumption on the premises; or a producer who delivers or sells milk to a distributor only. In addition, nothing in the act shall be construed to interfere with certain activities of cooperatives (q.v. under "Cooperative Status....").

Violation

Unlawful acts.- The word "unlawful" as applied to an act by a distributor does not appear in the law. It must be assumed, however, that any act for the commission of which a penalty of fine or imprisonment is provided, is an unlawful act.

Penalties.- Fine not exceeding \$100, or imprisonment for not more than one year, or both fine and imprisonment, are the penalties for any person who: (1) violates (a) any provision of the act or order thereunder, or (b) any rule or regulation of the board made thereunder; (2) fails to answer a subpoena or testify before the board; or (3) fails to take out a license as required in the act. Each day during which any such violation continues is deemed a separate violation.

Legal Remedies

Board.- The act does not in any way specify the procedure to be followed by the board in securing enforcement or in prosecuting violations. Where the case is one of statutory violation, the matter would apparently be prosecuted in a court of applicable jurisdiction, upon complaint and presentation of evidence by the board.^{11/} But in the case of violation of an "order or decision" of the board, the situation would be changed--in the event that appeal were taken by the violator directly to the State Supreme Court in the manner provided in the statute. In such case the Supreme Court makes sole determination of the issue, in the manner hereafter described and in the absence of any specific wording in the statute it is uncertain whether the board is itself empowered to take action by way of injunction.

Aggrieved persons.- Rights of any person deeming himself adversely affected by "any order or decision" of the board are carefully provided for in the statute; the procedure for application of a rehearing before the board, the filing and manner of appeal after denial or granting of such rehearing, the placing of the burden of proof upon the appellant, the admission of new or additional evidence, etc., are elaborated in 20 of the 36 sections contained in the act.^{12/} Rehearing may be granted by the board upon motion,

^{11/} Likewise, where no appeal is taken, in the case of violation of an order, rule or regulation.

^{12/} In the act of 1933 there was no provision of any sort regarding rehearing before the board or appeal to any court from an order of the board.

if made within 20 days after the applicable order or decision and if in the opinion of the board good reason is stated in the motion. Grounds for such motion are that the action of the board is unlawful or unreasonable. Within 10 days after filing of such motion, the board shall either grant or deny the motion, or suspend the order or decision complained of. Appeal may be taken to the Supreme Court, if made within 30 days following the board's denial or admission of rehearing. Appeal shall not be considered by the court until the petitioner has paid the board 10 cents per folio of 100 words for a copy, and five cents per folio for manifold copies, of the record (and of such testimony and exhibits as shall be transferred) required to be filed in the case.

Upon the hearing before the Supreme Court, the burden of proof rests on the petitioner seeking to set aside any order or decision of the board, the ground being that such order or decision is "clearly unreasonable and unlawful". "All findings of the board upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless it clearly appears that such order is unjust or unreasonable." Nor shall new or additional evidence be introduced except under certain exceptional circumstances, in which case it may be taken before a single justice or a master appointed by the Court, who shall, "upon the motion of any party filed within five days after the taking thereof", cause a copy of "such new evidence" to be transmitted to the board, and all proceedings shall be stayed for twenty days from the date of such transmission. Final judgment upon every appeal shall be a judgment either dismissing the appeal, or vacating the order complained of, in whole or in part as the case may be. In case of the latter, the Court may, in its discretion, remand the matter to the board for such further proceedings not inconsistent with the judgment, "as in the opinion of the board justice may require".

The act permits no proceeding, other than the appeal herein stated, to be maintained in any court of the State to set aside, enjoin, the enforcement of, or otherwise review or impeach any order of the board; nor shall appeal or other proceedings taken from an order of the board suspend the operation of such order pending final determination by the Supreme Court-- unless, "in the opinion of the court, justice requires such suspension".

Status of Cooperative Associations of Producers

The statute contains three references or provisions with respect to producers, associations or cooperatives. First, "person" is defined to include any "cooperative association"; second, the board in fixing prices may fix prices "that shall be paid producers or associations of producers by distributors..."; finally, there is the customary provision providing that nothing in the act shall be construed to prohibit a "producers' cooperative, organized under the Public Laws," (1) from blending the proceeds from the sale of its milk in all markets and in all classifications and distributing

such proceeds to its members in accordance with the terms of contract with its members, or (2) from making authorized deductions from sums due members.^{13/}

PART TWO

I. Administrative Procedure, Rules, Regulations and Orders.^{14/}

Extent of authority exercised in State.- Authority of the board, under the act of 1933, appears to have been confined to a few principal markets designated by the board as "natural marketing areas". Such designation was contingent upon written request of the producers who either through their associations, or collectively if there were no associations, supplied in the judgment of the board "a substantial proportion of the milk consumed" in such markets. Among designated markets are Burlington, Winooski, Rutland, Springfield, St. Alban, Canaan and various shore line and summer resort areas.

Persons controlled or affected.- Under the 1933 act, the licensing of dealers was discretionary with the board. Nevertheless, in certain designated markets, licenses were required of all dealers, including producer-dealers and stores, as well as firms, corporations and individuals distributing milk.

Classification for purpose of price determination.- There was no wording in the 1933 law specifically empowering the board to fix prices on a class-use basis. The board might "fix prices for different grades of milk" and also "fix the prices to be paid producers by dealers". Under this authorization, the board fixed both resale and producer prices. Resale prices applied in the case of "whole milk", "sweet table cream", "medium cream", and "light or coffee cream", sold at wholesale and retail. Where Certified milk was sold in a market, its price was fixed higher than that of "whole milk". Dealers were required to pay producers one price for "milk sold as fluid" and a lower price for milk to be separated "for resale as fluid cream within the market".

Method of payment: no base rating or market-wide pooling.- From data available, it does not appear that the board has promulgated any regulations as to the method of payment to producers by dealers other than to pay the prices fixed by the board to be paid for milk sold as fluid milk and for milk that is to be separated for resale as fluid cream. In some cases, the price is a delivered price to the dealer at a fixed price per quart--the

^{13/} There is no provision in the act requiring such cooperative in the blending and distributing of proceeds to do so on the basis of prices established by the board.

^{14/} Because the present statute is of recent date, discussion of administrative procedure is confined to such activities under the act of 1933, as the data available reveal.

pricing order not specifying the butterfat content of such milk; in other orders, producers are required to be paid by dealers for milk for "fluid milk" and milk for "fluid cream" at fixed prices per hundredweight, respectively, on the basis of butterfat, with a differential of four cents for each 1/10th of one percent butterfat variation from 3.7 percent. No provision is found in any of the orders or rulings now available regarding the time when payments must be made by dealers^{15/}, nor any as to transportation charges. And, as would be expected from the silence of the 1933 law on the subjects, there have been no attempts by the board to conduct market-wide pooling or base rating.

Trade practices.- In one ruling, only, does the board appear to have considered the matter of trade practices, the text stating that "No discounts, rebates, free merchandise or price concessions of any nature will be allowed."^{16/}

Records and reports.- The act of 1933 authorized the board to require all dealers in any market designated by the board to keep such records as the board might direct. The extent to which such authority was exercised is unknown. No reference to the keeping of records or to the making of reports is found in available material received from the board.

PART THREE

Legal Status

The files of the Dairy Section contain nothing of a specific nature in regard to violations under the 1933 law or to litigation thereunder. The Chairman of the Board, writing November 20, 1935, said: "This Act has been especially successful in its operation." The fact that the Supreme Court of New Hampshire has held the milk control act of its State unconstitutional and invalid--an act very similar to the former Vermont act--may be responsible, in part at least, for the adoption of the present law in Vermont.

^{15/} A postcard notice from the board's chairman, dated June 1, 1935, states that "If payments are made oftener than twice monthly, composite tests (of milk or cream purchased for resale) shall cover such pay periods."

^{16/} From Findings and Rulings for the Burlington (and certain other named places) market area, effective August 15, 1933.

